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No. 92-218

In the Supreme Court of the United States

OCTOBER TERM, 1992

ARKLA, INC.,
PETITIONER
v.
JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Arkla, Inc. is a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Little Rock, Arkansas and Shreveport, Louisiana. This corporation has only wholly owned subsidiaries. Arkla, Inc. is a publicly traded corporation listed on the New York Stock Exchange.

Respondent James C. Pledger is the duly appointed and currently serving Director of the Arkansas Department of Finance and Administration. He is the person who is charged by statute with administering the state and local Compensating (Use) Taxes and Gross Receipts (Sales) Taxes imposed in Arkansas.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. OVERVIEW OF BRIEF IN OPPOSITION

In its Petition for a Writ of Certiorari, Petitioner stated a rather succinct three-fold argument why this Petition for a Writ of Certiorari should be granted:

(1) There is a clear conflict between the decision of the Arkansas Supreme Court in this proceeding and this Court's decision in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S. Ct. 279 (1929).

(2) There is a clear conflict among the final decisions of the Supreme Courts of Tennessee and Wisconsin vis-a-vis those decisions of the Supreme Courts of Utah, Arkansas and Mississippi; and

(3) The decision below is clearly contrary to the rule set forth in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 88 L.Ed. 1304, 64 S.Ct. 1023 (1944).

Respondent, in his Brief in Opposition to the Petition, actually acknowledges that he agrees with those three assertions. Respondent in his brief acknowledged that:

As to contention (1) above, Arkla is correct; there is a conflict between the decision of the Arkansas Supreme Court and *Helson*. In his brief Respondent stated "[d]isregarding the sales/use tax distinction and comparing the ferry boat to the compressor, **there appears to be conflict between the decisions.**" (Respondent's Brief In Opposition, p. 9.)

As to contention (2) above, Arkla is correct; while he alleges the *Midwestern Gas*[1] decision can be distinguished on

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[1] *Midwestern Gas Transmission Corp. v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), *cert. denied*, 439 U.S. 997, 58 L.Ed.2d 670 (1978).

its facts, Respondent stated "[t]he decision of the Tennessee Supreme Court and the Arkansas Supreme Court **do appear to conflict as to the standard to be applied in the taxation of compressor fuel.**" (Respondent's Brief, p. 7.)

As to contention (3) above, Arkla is correct; the Respondent stated that he "**does not disagree that the State of Arkansas may not assess a sales tax upon interstate sales which both originated and are completed in another state**" (Respondent's Brief, p. 9), but he suggests that "those are not the facts before this Court." (Respondent's Brief, p. 9.)

Thus, the major premises upon which Arkla suggests this Court should grant the writ applied for are each agreed to by the Respondent. He acknowledges that there is a conflict between the *Helson* decision and the Arkansas Supreme Court decision, he acknowledges that there is a conflict at least between the Arkansas Supreme Court decision and the Tennessee Supreme Court decision, and he acknowledges that Arkansas may not assess a sales tax upon a transaction which originated and was completed in another state. However, while the Respondent acknowledges the conflicts between the instant decision and the *Helson* and *Texas Gas* cases, he suggests that this Court adopt a "no harm, no foul" standard for resolving conflicting decisions when he suggests that these cases "present no real harm from minor conflict." (Respondent's Brief, p. 8.) Direct, irreconcilable conflicts of decisions that affect numerous state taxing agencies and all operators of interstate pipelines are the type of conflicts which only this Court can and should resolve!

II. CONFLICTS WITH OTHER STATE COURT DECISIONS

In Section I, Part A of the Petition (pp. 9–11), the Petitioner noted the clearly irreconcilable conflict between two sets of decisions, namely the decisions in *Texas Gas Transmission Corp. v. Benson*, 444 S.W.2d 137 (Tenn. 1969), *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, *supra*, ftnt. 1, and *Michigan Wisconsin Pipe Line Co. v. State*, 227 N.W.2d 334

(Mich. App., Div. 2, 1975), and those of the instant case, *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992), and *Questar Pipeline Company v. Utah State Tax Commission*, 817 P.2d 315 (Utah 1991).

In response to that contention, the Respondent acknowledges that *Texas Gas* conflicts with the decision at issue, but argues that *Midwestern Gas* is factually distinguishable (p. 4 of its Brief in Opposition), that *Midwestern Gas* was a "nexus" decision (p. 5) and that a later decision, while not overruling it, "implied" that it would no longer be followed (p. 5). While all cases are somewhat factually different, the dissenting opinion in the case at bar itself noted that *Midwestern Gas* is "a case that presented a factual situation similar to the one here." (Petition, Appendix A, p. 8a.) The Department only specifies those factual differences as (i) *Midwestern Gas* is a use tax case, not a sales tax case (p. 4), (ii) none of the gas in Midwestern's lines had been produced in Wisconsin (p. 4), and (iii) Arkla has a greater nexus with Arkansas than Midwestern Gas had with Wisconsin (p. 5).

As Petitioner set forth in Section II of the Petition (pp. 21–27), the "only excise tax which the State of Arkansas could have possibly imposed upon the consumption of a part of the natural gas in question ... would have been its **use** tax . . .." (Petition, p. 26.) However, the Commerce Clause limitations upon the imposition of either a **sales** tax or a **use** tax on the value of the compressor fuel would have been precisely the same. As is noted in Section I of the Petition, if under *Helson* a **use** tax could not have been imposed upon the value of the fuel consumed to operate the ferry because it was an imposition of a direct tax upon an instrumentally of interstate commerce moving goods in interstate commerce, a **sales** tax upon the withdrawal of that very same fuel (as Arkansas suggests it can create) would have fallen for precisely the same reasons. Thus, the fact that the tax in *Midwestern Gas* was a **use** tax rather than a **sales** tax, is a difference without a distinction.

The Department next contends that the fact that in *Midwestern Gas* none of the gas was produced in Wisconsin should be a material factual distinction. While the Department suggests that

Petitioner is unable to establish the amount of natural gas produced outside of Arkansas, the record actually reflects that less than 10% [2] of the gas passing through the Dunn Compressor Station was produced in Arkansas. That record also clearly reflects that the natural gas within the interstate pipeline system is gas in interstate commerce, irrespective of where it is produced and purchased. All natural gas consumed as compressor fuel and at issue in these proceedings, whether that gas was produced in Texas, Oklahoma, Kansas, Louisiana or in Arkansas, was, at that moment, within the interstate natural gas pipeline system such that it was, legally, **interstate** natural gas subject to the exclusive jurisdiction of the FERC.[3] Thus, this is a minor factual difference, with absolutely no legal distinction. Gas in interstate commerce is interstate commerce irrespective of where such natural gas is produced or purchased.

The Department lastly suggests, as a factual difference, that Arkla has a substantial nexus with Arkansas, but Midwestern did not with Wisconsin. While this may be a relevant factual difference if Arkla were contending that there is insufficient nexus between Arkla and the State of Arkansas for the tax to be imposed, that is not the principle issue of the Petition filed herein. Thus, that factual distinction is also irrelevant to the suggestion that a writ should not be granted herein.

Respondent also suggests that in *Wisconsin Telephone Co.*

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[2] It was indicated that the percentage of Arkansas production passing through the Dunn Compressor Station was "somewhere in the neighborhood of 10 percent" (Tr. p. 248). The record further reflects that for the year 1978, 9.37% of the gas passing through the Dunn Compressor Station was produced in Arkansas, thus 90.63% was produced outside the state (Tr. p. 280).

[3] Mr. John Shafer clearly testified (Tr. p. 253–54) with respect thereto, and such issue has been addressed by this Court and other courts in the United Gas and related cases; *see* FPC Order No. 610, 447 Federal Power Commission Reports 245 (February 9, 1972), *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 32 L.Ed.2d 369, 92 S.Ct. 1827 (1972), *Louisiana Power & Light v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

v. Wisconsin Department of Revenue, 371 N.W. 2d 825 (Wis. 1985), "the Wisconsin [Supreme] court implied that it would have upheld a **sales** tax assessment upon the **use** of natural gas" (Respondent's Brief, p. 5, emphasis supplied), in effect overruling *Midwestern Gas*. That characterization of *Wisconsin Telephone*, however, is a significant misstatement of the holding of that case. The Wisconsin Supreme Court clearly distinguished *Midwestern Gas* from the telephone situation on a factual basis, finding, as its foundation for rejecting the argument that *Midwestern Gas* was on point, that unlike *Midwestern Gas*:

> The [sales] tax is not imposed on interstate activity midstream, but on the sale at the call's origin, an activity which occurs in Wisconsin. The sellers and buyers of the telephone services are located in Wisconsin. The placing of the telephone call and subsequent billing occur in Wisconsin. 371 N.W. 2d 825, 829.

There are no other references, direct or indirect, in *Wisconsin Telephone* to the *Midwestern Gas* decision other than those which lead to this specific, distinguishing holding. Thus, every indication in *Wisconsin Telephone* is that *Midwestern Gas* is, and remains, the controlling precedent in that state with respect to the imposition of a use tax upon the value of compressor fuel such as that at issue herein.

Thereafter (at page 6) the Respondent seems to suggest that Petitioner asserts that there is a conflict among the decisions of the Supreme Courts of Arkansas, Mississippi and Utah. However, Petitioner does not make that contention. The decisions of the Wisconsin and Tennessee Supreme Courts and the Michigan Court of Appeals are all basically in alignment. The decisions of the Supreme Courts of Arkansas, Mississippi and Utah are likewise basically in alignment as to their results -- each of those cases applied the *Complete Auto Transit* test, and **only** that test, and none ever mentioned the *Helson* decision. The conflict addressed by Petitioner is between these two sets of decisions, not within either set. Thus, Respondent's statement that "the Petitioner's

argument that there is a conflict among the State court decisions on this issue is incorrect," is itself manifestly erroneous, and results from the Respondent's failure to properly comprehend the argument advanced. The Respondent clearly acknowledges that there is a conflict between the instant decision and that in *Texas Gas*.

Respondent also suggests that the decision in *Rocky Mountain Oil & Gas Assn. v. Conrad*, 405 N.W. 2d 279 (N.D. 1987), held that "the burden on interstate commerce was unsubstantiated." (Respondent's Brief, p. 6). *Rocky Mountain* involved fuel for a processing plant located near the production field which may or may not have been in the stream of interstate commerce. However, after noting that the stipulation of facts failed to disclose any foundation of interstate commerce, the North Dakota Supreme Court specifically held "we decline to decide the constitutional issue." 405 N.W. 2d 279, 284. It did not find that "the burden upon interstate commerce was unsubstantiated" (Respondent's Brief, p. 6), as Respondent suggests; it stated "we **decline** to decide the constitutional issue." (Emphasis supplied.) 405 N.W. 2d 279, 284. Thus, that decision is totally irrelevant to the resolution of this case.

III. *HELSON* IS THE CONTROLLING AUTHORITY

One of the principle arguments advanced by Petitioner is that *Helson* is, and remains, the controlling authority of this case (Petition, pp. 11–20) and that decision, *Helson*, was not even mentioned in the majority opinion, nor in the decisions of the Supreme Courts of Mississippi and Utah. The Respondent's response to that contention is almost as brief as that of the majority opinion itself, presenting a one paragraph response which acknowledges that "there appears to be conflict between the decisions." (Respondent's Brief, p. 9.) It suggests, however, that *Helson* has died a natural death, being decided in 1929, and the Court having recently "taken a practical and more realistic approach to whether a tax is a burden on interstate commerce." (Respondent's Brief, p. 9–10.) However, as Petitioner has noted, *Helson* has never been overruled and did not die any natural death. Only four years before the decision in *Complete Auto Transit, Inc. v. Brady*, 430

U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545, 93 S.Ct. 1186 (1973), this Court affirmed that the line drawn by *Helson* continued to serve a rational purpose. It specifically retained, rather than overruled (or let die a "natural" death), the bright-line rule founded in the *Helson* decision.

Further, even after *Complete Auto Transit*, this Court has specifically retained that distinction. In *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981), this Court was afforded the clear opportunity to overrule *Helson*, if that were necessary or appropriate. Therein, this Court specifically noted that while to the extent *Helson* suggested a state tax or regulation was immune from Commerce Clause scrutiny because it attached only to a local or intrastate activity had been rejected, the Court stopped far short of overruling that decision. It specifically noted that *Heisler v. Thomas Colliery Co.*, 279 U.S. 245, 67 L. Ed. 237, 43 S. Ct. 83 (1922) and its progeny, which includes *Helson*, were not wrongly decided. Thus, for the reasons more fully set forth in the Petition (p. 11-21), *Helson* is the controlling precedent for resolution of this case. It has never been overruled and its bright-line rule -- no state may impose a direct tax upon fuel consumed within a state to power an instrumentality of interstate commerce -- continues to provide a viable line of demarcation of a realm of commercial activity that is free from interstate taxation.

IV. DOUBLE TAXATION

Throughout his Brief, the Respondent asserts that the principle (or possibly the only) purpose of the Commerce Clause is to ensure the avoidance of double taxation. On the contrary, the principle purpose of the Commerce Clause was to provide the Congress with exclusive control of such commerce, and the application of the Commerce Clause in the area of state taxation has been to prohibit the imposition of state tariffs which impair the free flow of commerce between the states. While the purpose of the Commerce Clause as it relates to the imposition of state taxes is much too broad an issue to address in this Reply Brief, avoiding

double taxation is only one of many purposes of the Commerce Clause.

Irrespective of the underlying purpose of the Commerce Clause, the statement by the Court below and repeated by Respondent in his Brief, that double taxation cannot occur in the case at issue because the compressor fuel is consumed, is clearly erroneous. The Arkansas Supreme Court rather offhandedly observed, in finding that the "fairly apportioned" standard of *Complete Auto Transit* had been satisfied, that "only that gas consumed in the state [of Arkansas] is subject to the tax, and no other state will tax the withdrawn gas once it is consumed." (Petition, Appendix A, p. 6a.) That rationale, however, is fallacious. The State of Oklahoma could very well conclude that the appropriate method of apportionment is, as is customary in the apportionment of most transportation company type taxes, to be based upon the miles of interstate pipeline located within the State of Oklahoma as compared to the total number of miles of the Company's interstate pipelines located in all states. If such were the case, with Arkansas having taxed 100% of the gas consumed in Arkansas, the proportion of the gas consumed in Arkansas which is thus allocated to the interstate pipelines located within the State of Oklahoma would be taxed twice. While Arkansas' method of taxation, **if adopted by all of the states**, would avoid the double taxation, it does not fairly apportion the tax on gas consumed to the respective states which benefit from the interstate transportation of that gas.

Arkansas does not attempt to impose a sales tax upon only the gas purchased and consumed in Arkansas (less than 10%) which could possibly afford a proper apportionment of that tax, it attempts to tax 100% of the gas consumed within the State without any apportionment to the other states in which the gas was produced or purchased. Thus, the tax at issue is, as Petitioner notes in its Petition, an **unapportioned** direct tax on the value of the gas consumed as compressor fuel.

V. THE *COMPLETE AUTO TRANSIT* TESTS ARE NOT SATISFIED

Respondent also suggests (p. 11) in a totally conclusionary fashion with no factual foundation whatsoever, that each of the tests of *Complete Auto Transit* are satisfied. However, such is not the case and this Court may find this case beneficial, not only in reaffirming the bright-line rule of *Helson*, but also in addressing points not properly addressed or considered by the Arkansas Supreme Court when it erroneously applied the *Complete Auto Transit* tests.

While this Reply Brief is not the proper forum for Petitioner's argument, upon granting of this writ, Petitioner will show that even if the *Complete Auto Transit* test is the proper test to be applied in this case, the Arkansas Supreme Court did not appropriately evaluate those tests. It clearly did not correctly evaluate the nexus and apportionment considerations, and definitely failed to properly consider the relevant factors under the "reasonably related to the services provided" test. Contrary to the conclusionary statements in both the majority opinion and Respondent's brief, this case does not satisfy the *Complete Auto Transit* tests.

VI. THE DECISION VIOLATES THE RULE OF *DILWORTH*.

Respondent acknowledges that Arkansas may not impose a sales tax upon a transaction which originated and was completed in another state. However, he suggests that these are not the facts presented here because a portion of the gas "used" (upon which a "**sales**" tax, not a "**use**" tax was levied) as compressor fuel was produced in Arkansas, therefore alleging that a "sale" occurred in Arkansas. Again, even if there were a "sale", a transfer of title or possession, [4] within Arkansas of the gas withdrawn and consumed, only that portion produced and consumed in Arkansas could ever be deemed to be an Arkansas "sale," subject to an Arkansas sales

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[4] *See*, Ark. Code Ann. §26-52-103(a)(3)(A), Petition, Appendix D, p. 27a.

tax. Here, however, Arkansas has levied an **unapportioned** sales tax upon **all** of the gas consumed within the borders of Arkansas irrespective of where the "sale" (the transfer of title or possession) occurred. The evidentiary record reflects that more than 90% of the gas in question was "sold" to Arkla outside of Arkansas' borders. Therefore, for the reasons set forth in Section II of the Petition (pp. 21–27), Arkla submits that the Respondent and the Arkansas Supreme Court have unquestionably overstepped the limitations on state taxation set by the Commerce Clause as interpreted by this Court in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 377, 88 L. Ed. 1304, 64 S. Ct. 1023 (1944).

VII. CONCLUSION.

Respondent's opposition to the Petition filed herein actually supports, rather than opposes the application. There are conflicts, clearly irreconcilable conflicts, between the decisions of the Supreme Courts of Wisconsin and Tennessee and the decisions of the Arkansas, Mississippi and Utah Supreme Courts, and between this Court's decisions in *Helson* and *Dilworth* and the decision appealed here. The Respondent, while attempting to show insignificant factual differences in the cases, acknowledges that such conflicts do exist. Therefore, for the reasons set forth in the Petition, a Writ of Certiorari to the Arkansas Supreme Court should be issued, this case heard by this Court and the decision of the Arkansas Supreme Court reversed.

Respectfully submitted,

SEPTEMBER 14, 1992

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